

Department of Navy



More than FTE's...
(FAR Part 22)



Goals & Objectives

- Goal: Understand the application of labor laws in federal contracts
 - Objective 1: Understanding Federal wage law
 - Objective 2: Application of the Service Contract Act (SCA)



Before we begin



Historical Title of Act	Division/ Chapter/ Subchapter	Title
Anti-Kickback Act	41 U.S.C. chapter 87	Kickbacks
Brooks Architect Engineer Act	40 U.S.C. chapter 11	Selection of Architects and Engineers
Buy American Act	41 U.S.C. chapter 83	Buy American
Contract Disputes Act of 1978	41 U.S.C. chapter 71	Contract Disputes
Contract Work Hours and Safety Standards Act	40 U.S.C. chapter 37	Contract Work Hours and Safety Standards
Davis-Bacon Act	40 U.S.C. chapter 31, Subchapter IV	Wage Rate Requirements (Construction)
Drug-Free Workplace Act	41 U.S.C. chapter 81	Drug-Free Workplace
Federal Property and Administrative Services Act of 1949, Title III.	41 U.S.C. Div. C of subtitle I*	Procurement
Javits-Wagner-O'Day Act	41 U.S.C. chapter 85	Committee for Purchase from People Who Are Blind or Severely Disabled
Miller Act	40 U.S.C. chapter 31, subchapter III	Bonds
Office of Federal Procurement Policy Act	41 U.S.C. Div. B of subtitle I**	Office of Federal Procurement Policy
Procurement Integrity Act	41 U.S.C. chapter 21	Restrictions on Obtaining and Disclosing Certain Information
Service Contract Act of 1965	41 U.S.C. chapter 67	Service Contract Labor Standards
Truth in Negotiations Act	41 U.S.C. chapter 35	Truthful Cost or Pricing Data
Walsh-Healey Public Contracts Act	41 U.S.C. chapter 65	Contracts for Materials, Supplies, Articles, and Equipment Exceeding \$15,000.



Federal Wage Laws



- Labor Standards for Contracts Involving Construction(DBA) 1931
 - Prevailing Wages/Fringe Benefits
 - Davis Bacon Related Acts
 - Contract Work Hours and Safety Standards (Act-1962)
 - Copeland Act
- Fair Labor Standards Act - 1938
 - Minimum Wage/Overtime
- Contracts for Materials, Supplies, Articles and Equipment Exceeding \$15,000



Federal Wage Laws



- Alteration of buildings, real property, mechanical systems?

Think-Labor Standards for Contracts Involving Construction

- Tangible items? (parts, supplies, new items etc)

Think-Contracts for Materials, Supplies, Articles, and Equipment Exceeding \$15,000


- Intangibles, work activity? (time effort, maintenance, support, training)

5/25/17 Think-Service Contract Labor Standards

- A combination of the above?



Why is this Important ?

- It's the law -- FAR, public policy
 - New Executive Order coming—Labor compliance as responsibility determination factor
- Services are a significant slice of contracting work Service contracts account for over half of DOD contract value
-  **YOU are an important link in the process!**
Lifelihoods are impacted



Further...



- Department of Labor(DOL)enforces SCA, DOL:
 - Investigates complaints
 - May require contract adjustment
 - Review contracts for labor law inclusion & WD
 - Can make determination labor law applicable & require inclusion
- DOL has sole and final authority under SCA to determine applicability
- Agencies are required to cooperate



What Else?

- Application of Labor Law to a contract has consequences:
 - Labor Impacts Cost
 - Acquisition Strategy
 - Contract Formation
 - Contract Administration
 - Contractor Labor Relations
 - Performance risk
 - FFP Service Contracts are not **FIXED**



THEREFORE - Smart strategy includes thorough analysis of elements in the anticipated service contract

5/25/17



Check on Learning

Name labor law applicable to each of the following:

Q. Alteration of buildings, real property, mechanical systems

A. Construction Wage Requirements Statute

Q. Tangible items? (parts, supplies, new items etc.)

A. Contracts for Materials, Supplies, Articles, and Equipment Exceeding \$15,000

Q. Intangibles, work activity? (time effort, maintenance, support, training)

A. Service Contract Labor Standards





Service Contract Labor Standards(SCA)

- Newest federal minimum wage laws- 1965 (amended 1972 & 1976)- Applicable to Federal contracts
- Ensures “service employees” are paid no less than those performing similar work in the same locality (prevailing wages)
- Wage and benefit rates are issued by the DOL and applied to individual contracts
- This is where **YOU** come into the picture!
- Safety and health protection-enforced by OSHA



Service Contract Labor Requirements

- Laws and Regulations:
- Federal Contracts:
 - Federal Acquisition Regulation (FAR) - Subpart 22.10
 - DOL- 29 Code of Federal Regulations (CFR) Part 4, 5, 541 and others
- Contractors:
 - Contract Requirements
 - Terms & Conditions
 - Performance requirements
 - DOL - 29 CFR 4(541, others) - Wages; Fringe Benefits; Vacation & Holidays



Service Contract Labor Standards

- **CO is required** to make Service Contract Labor Standards determination (& include clause and wage determinations in solicitations and contracts and update WD as appropriate)

- Contractors
 - Claims after award
 - Trained to follow contract
 - Must be competitive (declining budgets, LPTA?)



Service Contract Labor Standards



➤ Application Criteria:

- Principle Purpose = Service
- Performed with Service Employee(s)
- Contract value greater than \$2,500—
include clauses and wage determination
- Contract with Federal Agency
- Performed in US

➤ Exemptions



Prime contractor and flows down clause and wage determinations to ALL tiers of subcontractors



Principle Purpose = Services



- Contract purpose = Services
 - Nomenclature not controlling
 - Time and effort Vs. End product
 - Any tangible items are secondary
 - FAR 37 Service Contracting – Helpful - not controlling
 - Routine Maintenance Vs. Repair
 - Principally for service can include other labor laws, Labor Standards for Contracts Involving Construction & Contracts for Materials, Supplies, Articles and Equipment Exceeding \$15,000



Principle Purpose = Service

➤ If > 50% of the **cost** service or total hours of service employees

➤ Research, test, maintain, upgrade, operate, study, logistics support

OR

➤ Service with **EXEMPT** employees (i.e.: Research & Development), and

➤ 10%-20% work performed by **Service Employees**

➤ Clerks, Engineering Techs, CAD Operators



C-21 Supply or Service



It is not always crystal clear if SCA applicable...

Review - Letter to CO & Case Law



C-21 Details



It is not always crystal clear if SCA applicable...

Contract for logistical support and maintenance for C-21 (small 10-seat Lear Jet) aircraft at various locations in the United States and abroad. The contract includes all necessary labor, parts, equipment, modification to aircraft and rebuilding of aircraft engines and other components necessary to keep the fleet of C-21 aircraft in airworthy condition (in excellent flying condition).

The estimated total costs of the contract was approximately \$258M of which approximately \$203M were expended for parts, remanufacturing of aircraft engines and modifications to the aircraft and approximately \$55M were expended for maintenance services at nine "main operating bases" in the U.S. which employed approximately 10 full time service and maintenance employees at each location. The "Contractor Operated and Maintained Base Supply" facilities were also operated by contractor personnel (supply technicians). ARB 03-017 & 03-019, May 21, 2004 & 29 CFR 4.111 & 29 CFR 4.131 & 29 CFR 4.132



C-21 Decision

Principally for service-SCA applicable

Rationale -- Although tangible parts, supplies, remanufacturing, and aircraft modification were dominant in expenditures \$203 million vs. \$55 million; the overall character of the contract was deemed to be 'maintenance services'.

Approximately 190,000 man-hours of traditionally recognized 'service employees' were used annually on the contract. Also, this is arguably the classic case of a 'hybrid' contract where the SCA would apply to the service employees under that portion of the contract and the Walsh-Healey Act would apply to the purchase of parts and the remanufacturing portions of the contract.

- Typical types of SCA covered services are listed at FAR 22.1003-5 and 29 CFR 4.130
 - Today's service contracts are not always typical **BUT** rules still apply



Types of covered service contracts...

Recognize any of these service?



- Cataloging Services
- Chemical Testing and analysis
- Computer Services
- Custodial, Janitorial and housekeeping services
- Data collection , processing and or analysis services
- Drafting and illustrating
- Electronic equipment maintenance and operation and engineering support services
- Geological field surveys and testing
- Inventory services
- Laboratory analysis services
- Maintenance and repair of all types of equipment(aircraft, engines, electrical motors, vehicles and electronic telecommunications, office and related business and construction equipment
- Operation maintenance or logistic support of a Federal facility



Food for Thought

The Act's implementing regulations make it clear that determining the principle purpose of a contract is not subject to a "bright line" test...

"...determining a contracts principle purpose within the meaning of the Act is largely a question to be determined case by case an on the basis of all the facts in each particular case..."



Service Employee





Service Employees

FAR 22.001 Definitions

“Service employee” any person (directly) engaged in the performance of a service contract

other than any person employed in a bona fide executive, administrative, or professional capacity as those terms are defined in 29 CFR part 541

Includes all such persons regardless of any contractual relationship that may be alleged to exist...Subcontractor,



Service Employee

- Duties govern the classification & the rate of pay

Subminimum rates permissible

Lowest level listed “Entry”

General Clerk I

General Clerk II

General Clerk III

Directory of Occupations-Generally lists duties

- Conformance-When there is no classification



Service Employee

- Employees **“directly engaged”** in performing the contract work (FA 22.001)



AND ALSO

- Not **“exempt”** from the SCA wage



Service Employee/Directly Engaged

➤ Grounds maintenance contract:

- Tractor operators
- Grounds maintenance laborers
- Pruners

Directly engaged
“Service”
employees

- Equipment mechanic
- Payroll clerk
- PM’s admin assistant

Not “directly
engaged”
Business support
employees
Not “service”
employees

FLSA
Minimum Wage

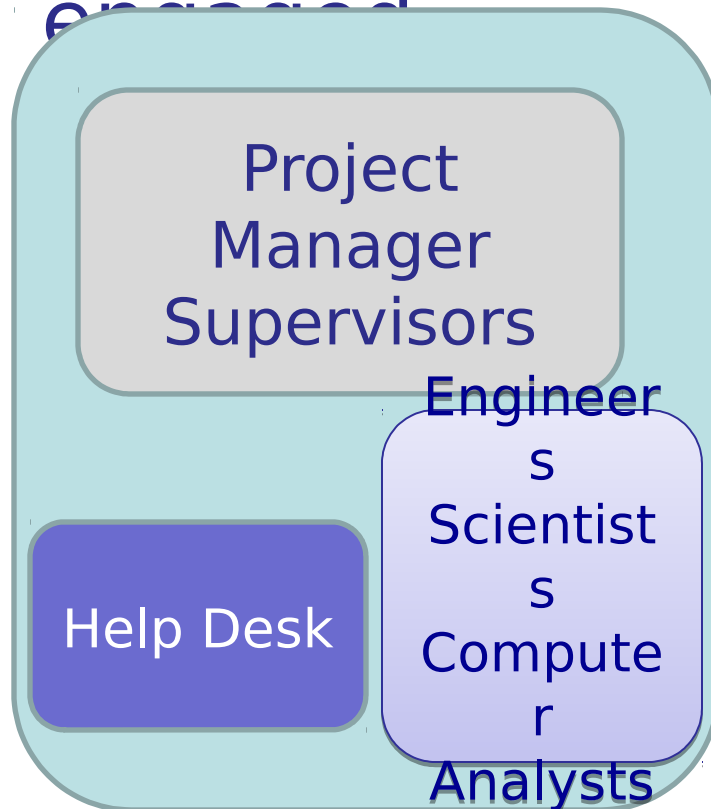


Service Employee

NOT

Directly engaged

Directly





Service Contract Labor Standards Exempt





Service Contract Labor Standards Exempt



- Statutory Exemptions FAR 22.1003-3
- Administrative limitations, variations, tolerances and exemptions FAR 22-1003-4
 - Determinations
 - Certifications

541 Exemptions(Position)



Service Contract Labor Standards Statutory Exemptions

FAR 22.1003-3



- Construction, alteration, repair of public buildings or public works including painting and decorating
- Contracts for Materials, Supplies, Articles and Equipment exceeding \$15,000
- Radio, telephone, telegraph, or cable sub to Communications Act of 1934
- Direct services to Federal agency by an individual
- Operating postal contract stations for US Post Office
- Public utility services
- Freight where tariff



Administrative limitations, variations, tolerances and exemptions



FAR 22-1003-4

Services

- Automobile or other vehicle maintenance services
- Financial services involving issuance & servicing of credit cards
- Hotel/motel services for conferences, including lodging and meals
- Maintenance, calibration, repair or installation for equipment (from manufacturer, sole source)
- Real estate services, including property appraisal
- Transportation by common carrier
- Relocation services

Conditions & Certification (FAR 52.222-48)



Not “Service Employee”



“Service employee” means any person engaged in the performance of a service contract **other** than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in DOL

29 CFR part 541

Lets talk about those classifications...



Not Service Employee

Executive*(Salaried only)

- Managing the enterprise
- Direct the work of others(2+)
- Authority to hire and fire

Professional

- Advanced knowledge
- Exercise discretion and Judgment

Administrative

- General Operations
- Exercise discretion and Judgment

Computer Programmer/System Analyst (\$27.63/Hour)

http://www.dol.gov/whd/regs/compliance/fairpay/fs17a_overview.pdf

All must
be
salaried*
or fee
based and
paid
Not less
than
\$455/Week



Salary or Fee

➤ Salary

- Regularly receives a predetermined amount
- Not subject to reduction
- Must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked

➤ Fee

- Paid an agreed sum for a single job regardless of the time required for its completion
- Payments resemble piecework payment
- Distinction, generally "fee" is paid for the



29 CFR 541



- “Professional” contract services **do not** equal Service Contract Act (SCA)-“Professionally” Exempt (aka 541 exemption) when requirement is “Principally for Services”
- Architect Engineering Services (A&E); Engineering Services & Advisory & Assistance Services (A&AS) are **NOT** automatically “Professionally” exempt from SCA
- Analysis necessary...



Job Titles Insufficient

- Labor analysis is necessary
- Retain determination in official contract file
- Job title alone **does not** establish/determine
- Exemption(SCA)to be determined on a case by case basis
- Must meet **all** of DOL regulation criteria

Popular misconception: SCA Service employee is **not** limited to low skilled, blue collar classifications

Department Of Labor(DOL) Factsheet 17A Exemption for Executive, Administrative, Professional, Computer and Outside Sales Under Fair Labor Standards Act-link http://www.dol.gov/whd/overtime/fs17a_overview.pdf

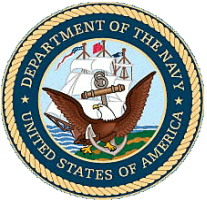


Analysis



- Plan for labor requirements at Acquisition Strategy –
- “Agencies shall perform acquisition planning and conduct market research for all acquisitions in order to promote and provide...”

Labor Category	Education	Experience	SCA Exempt
Senior Engineer/Scientist/Geologist/Risk Assessor	Bachelor	10+Years...	How Many() Depends
Junior Architect	Bachelor	0-5 years....	Probably Not
Cost Estimator/Spec Writer	Bachelor	5 years project related...	Probably Not
Sr Architect/Planner	Bachelor	10+Years	How Many() Depends
Sr CADD/GIS/Graphics	High School	7+ years	Not



SWAG Analysis



CLASSIFICATION

HOURS

Senior Business Intelligence SME	22195.2
Business Intelligence SME	11097.6
Knowledge Mgmt Specialist	4439.04
Senior ERP Functional Integrator	11097.6
Senior SAP - OF/SD/MM/SCM/Proc or other C	33292.8
Midlevel SAP - OF/SD/MM/SCM/Proc or other	44390.4
Senior Workforce Management SME	11097.6
Workforce Management SME	11097.6
Midlevel Finance/Controlling/Asset Accting o	22195.2
Senior Finance/Controlling/Asset Accting or	44390.4
Senior SAP Solution Architect or other COTS	33292.8
Midlevel SAP Solution Architect or other CO	22195.2
Training Management	11097.6
ERP Cutover Management	11097.6
User Management	11097.6
Programmer/Configure BASIS Senior or othe	22195.2
Programmer/Configure BASIS Junior or other	11097.6
Senior ABAP/RICE Developer or other COTS	66585.6
Mid-level ABAP/RICE Developer or other CO	44390.4
Quality Assurance/Testing Analyst	11097.6
Project Manager - Senior	22195.2
Project Manager- Midlevel	22195.2
Project Management - Office Analyst	15490.4
Program Manager/Delivery Executive	4439.04
Senior Operations Research Analyst	5548.8
Midlevel Operations Research Analyst	5548.8
Junior Operations Research Analyst	2219.52
Senior Knowledge Mgt	2219.52
.NET Developer- Senior	11097.6

SWAG /ANALYSIS

- 1-Review list of classification
- 2-Highlight the classifications that may not meet the 541 criteria
- 3-Compute---Total number of hours minus hours of classifications not meeting exemption
- 4-Divide not exempt hours by total
- 5-20% or more service employee population, include SCA
- 6-Document file for next guy



29 CFR 541



- 29 CFR 541 provides in depth information regarding definitions used in Fact Sheets 17A & G
- Recommend referring to when making determination of SCA exempt Executive, Professional, Computer Related Occupation, Highly Compensated, and
- Pay particular attention to 541.308 Nonexempt work generally, "...It does not exempt all employees of professional employers, or all employees in industries having large numbers of professional members or employees in any occupation...The field of engineering has many persons with engineer titles, who are not professional engineers as well as many who are trained in the engineering profession but are actually working as trainees, junior engineers or draftsmen."



Professional Employee Compensation

FAR 22.11



POLICY-All professional employees shall be compensated fairly and properly.

Requires

- \$650,000 & Professional Employees
- 52.222-46 Evaluation of Compensation for Professional Employees
 - Evaluation of total compensation plan setting forth proposed salaries and fringe benefits working on the contract



Finally



If service contract & undetermined (exempt/service employees) include SCA & WD's

- Government responsible to include proper terms and conditions
- Contractor is responsible for proper determination of status of their staff
- Document official contract file with determination from your analysis---

Mixed "service employee" and professionally exempt include SCA when service employees perform greater than 20% of the contract-more than a minor use of service employees



Analysis

Logistics support, equipment repair etc

5-Engineers

2-Computer Programmers

**Earned Professional
& Computer
Exemptions**

Exempt Employees

2-Tech Writers

8-Electronic Technicians

2-Supply Technicians

**Non-exempt
directly
engaged**

Subcontractor

Unknown

Conclusion: 19 known employees directly engaged in performing contract of whom 12 are considered "Service Employees" THEREFORE the "Substantial/Significant criteria for SCA application is MET.



Analysis

➤ Architect & Engineering Services

➤ 1-Architect

➤ 2-Engineers

Professional
Exemption

➤ 2-Draftsmen CAD
operators

➤ 4-Survey Crew

➤ 2-Administrative
Support

➤ Environmental
Consulting Firm

Unknown

Non-Exempt-
Directly
Engaged

Conclusion: Eleven employees directly engaged in performing contract work of whom eight are considered "Service Employees" therefore substantial and significant criteria for SCA application is met.



Check on Learning



Radiology services will be provided by a qualified contractor. Technicians will be required to receive patients and administer the test. Physicians services will be provided to read and interpret the result of the testing. Assuming greater than 20% service employees





No SCA Exemptions



- R & D
- GSA Contracts
- Logistics Support
- Ability One (NISH)
- Utilities Privatization
- Professional Services
- Commercial Purchases
- Environmental Services
- A & E Contracts (Brooks Act)
- Training exercises or education
- Curriculum support or development
- Basic Ordering Agreements



Check on Learning



Q. When is the Service Contract Labor Standards applicable?

A. Principally for services & service employees, US and greater than \$2,500

Q. What is a service employee?

A. One who is directly engaged and not exempt

Q. Who are SCA "exempt" employees?

A. Professional, Administrative, Executive, Computer classifications-meeting all 29CFR541 criteria





Checklist

- Acquisition strategy planning---labor risk (cost and performance)
- Determine SCA applicability (identify other than SCA)52.222-41, 42(fill-in) and 43 (when FFP)
- Update WD IAW 22.1007(Options, Extensions, signification change in labor requirements, contracts)
- CBA - Notification to contractor and union IAW FAR 22.1010 (30 days in advance of earliest applicable acq. date)
- Require contractor strike contingency plan where necessary
- Include required clauses (FAR 22.1006)
- DOL poster WH-1313



Multiple Wage Statues



- Principally for Services, does not exclude incorporation of other labor laws

Welsh Healey
Remanufacturi
ng
Supplies

Principle
Purpose
Services

Constructio
n
Alteration-
Repair



Multiple Wage Statutes

- Labor Standards for Contracts Involving Construction(Davis Bacon Act) applies to work performed under a service OR supply contract **IF** the construction is:
 - “Substantial” > \$2,000 (substantial in its own right, **NOT** when compared to entire contract)

AND

- “Segregrable” Construction work is physically or functionally separate from and as a practical matter is capable of being performed on a segregated basis from the other work called for by the



Construction

FAR 22.402(b)



DASN Policy Guidance Aug 18 2011

- Restates DON construction authority, 5201.601.90 &
- Reinforces policies and procedures

DASN Guide to assist in actions and tools

<http://www.secnav.navy.mil/rda/pages/DocumentDetails.aspx?doc=08062012NCCwCGuideFINAL4>

VERY comprehensive document



Check on Learning



Q. When is the Davis-Bacon Act included in SCA contracts?

A. When construction requirement is substantial and segregable

Q. What is considered “Substantial”?

A. Construction requirements >\$2,000

Q. What is considered “Segregable”?

A. Construction work physically or functionally separate from other contract work





Finally

Resources—

<http://www.dol.gov/whd/govcontracts/sca.htm>

[Prevailing Wage Resource Book](http://www.dol.gov/whd/recovery/pwrb/toc.htm)

<http://www.dol.gov/whd/recovery/pwrb/toc.htm>

[DOL Field Operations Handbook](http://www.dol.gov/whd/FOH/FOH_Ch14.pdf)

http://www.dol.gov/whd/FOH/FOH_Ch14.pdf

[29CFR541](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=48d6ee3b99d3b3a97b1bf189e1757786&rgn=div5&view=text&node=29:3.22&idno=29)

[http://
www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=48d6ee3b99d3b3a97
b1bf189e1757786&rgn=div5&view=text&node=29:3
.22&idno=29](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=48d6ee3b99d3b3a97b1bf189e1757786&rgn=div5&view=text&node=29:3.22&idno=29)

[DOL Directory of Occupations](http://www.dol.gov/whd/regs/compliance/wage/SCADirV5/SCADirectVers5.p)

[http://
www.dol.gov/whd/regs/compliance/wage/SCADirV5/SCADirectVers5.p](http://www.dol.gov/whd/regs/compliance/wage/SCADirV5/SCADirectVers5.p)

[Directory of Occupations Crosswalk to Federal Ratings](http://www.dol.gov/whd/regs/compliance/wage/SCADirV5/Vers5ContentsTable.pdf)

[http://
www.dol.gov/whd/regs/compliance/wage/SCADirV5/Vers5ContentsTa
ble.pdf](http://www.dol.gov/whd/regs/compliance/wage/SCADirV5/Vers5ContentsTable.pdf)

